92-816

In the Supreme Court of the United States

Supreme Court, U.S.
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No.

D.R., a minor child, by her parent and natural guardian, L.R., and L.R., individually and in her own right
and
L.H., Bucks County, Pennsylvania,

Petitioners,

v.

MIDDLE BUCKS AREA VOCATIONAL TECHNICAL SCHOOL; WILLIAM GOODE; JAMES C. BAZZEL; MARTHA RICHINO; SUSAN PETERS; BUCKS COUNTY INTERMEDIATE UNIT NO. 22; CHRISTINA TUTTLE; PENN RIDGE SCHOOL DISTRICT; CHARLES FAMBRO; FRED FREEMAN; JAMES A. GALLAGHER; BRIAN MILLER; MARC R. RATCLIFFE; JAMES M. SPERLING; LESTER SUTPHIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

In its interpretation of the right to judicial protection of the Constitutional right to freedom from invasion of personal liberty interests – *e.g.*, the right to be free from offensive, unconsented-to physical or sexual touching – under 42 U.S.C. § 1983 as delineated in *Ingraham*[1], *Youngberg*[2], *and DeShaney*[3], does this Court intend that children (even those of tender years or diminished capacity) not be entitled to be free from unconsented-to physical and sexual assaults by their school classmates? *I.e.*, do the substantive protections of the Due Process Clause, as enforced through the Civil Rights Act of 1871, including particularly § 1983 thereof, extend to the protection of school children from physical and sexual assault in the school room so as to require school officials and school municipalities to insure the protection and vindication of those rights at the risk of compensatory damages liability under § 1983?[4]

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1. *Ingraham v. Wright*, 430 U.S. 651, 673-674 (1977).

2. *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982).

3. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989).

4. This Court recently denied review of a similar issue in *Jones v. Dayton Board of Education*, No. 90-1982, perhaps due to a procedural glitch in that case. See, __ U.S. __ (1991) and 60 USLW 3111, 3258.

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OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (Giles, J.) is not officially reported but is attached hereto at App. A-1 thru A-25. The opinion of the United States Court of Appeals for the Third Circuit (panel decision) is not officially reported and has been withdrawn by the court pursuant to the court's grant of rehearing *en banc* but is attached hereto at A-26 thru A-51. The opinion of the United States Court of Appeals for the Third Circuit (*en banc*) is reported at ___ F.2d ____ (1992) but is also attached hereto at A-52 thru A-103. The Judgment of the court below is attached hereto at A-104 and A-105.[5]

STATEMENT OF JURISDICTION

Federal jurisdiction was invoked under 28 U.S.C. §§ 1341 and 1343 (1988) with appellate jurisdiction in the court below attaching pursuant to 28 U.S.C. § 1291 (1988). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), this being a Petition for a Writ of Certiorari to review a final decision of the United States Court of Appeals for the Third Circuit entered on August 11, 1992.

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5. Pursuant to Rule 12.2 of the Rules of this Court, this Petition is filed jointly on behalf of the three Appellants whose two separate lawsuits were consolidated by stipulation in the courts below.

STATUTE INVOLVED IN THE CASE

The sole statute, the interpretation of which is implicated in this Petition, is codified at 42 U.S.C. § 1983 and provides, in full text, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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STATEMENT OF THE CASE

A. Statement of Proceedings in the Courts Below.

These actions were commenced on May 2, 1990 (in the D.R. case) and on May 3, 1990 (in the L.H. case). In their Complaints, each of the Plaintiffs, one of whom was a minor child and one of whom has now attained her majority, asserted claims under the Federal Civil Rights Acts, 42 U.S.C. §§ 1983, 1985(3), 1986 and 1988, alleging that their teacher (Defendant Peters) and other responsible school officials, as well as the School Districts themselves, had transgressed against the Constitutionally-protected civil rights of these minor Plaintiffs by knowingly and recklessly permitting policies, customs and practices to persist in the particular school and class in question.[6]

That is, each of the student Plaintiffs alleged that (a) she was a female student in the school, (b) that, as such, she was assigned to the vocational graphics arts class in the school, (c) that while there she was subject to the supervision and control of a particular classroom teacher (Defendant Peters) and the principal and vice-principal of the school (Defendants Goode and Bazzel), (d) that while in such class the female student plaintiffs were subjected to offensive, unconsented-to, sexual harassment, physical touchings and physical and verbal abuse by other (male) students under circumstances where, (e) the student teacher, both actually and constructively, and the school principal, constructively, as well as the vice-principal, both actually and constructively, knew that such events were ongoing and (f) the classroom was arranged in such a manner that there was a unisex bathroom with a door lockable from within, (g) a segregated, enclosed photographic darkroom with a door lockable from within, and (h)

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6. As appears from the first paragraph of the D.R. Amended Complaint:

> 1. L.R., Plaintiff herein, brings this Complaint individually and as the parent and natural guardian of D.R., a child of tender years. Both L.R. and D.R. are citizens of the Commonwealth of Pennsylvania, having their residence in Bucks County, Pennsylvania.

circumstances whereby the classroom teacher was unable to control the behavior of the male students so as to prevent the offensive conduct of which complaint was made.

The School Defendants responded to the Complaint by filing 12(b)(6) motions to dismiss which asserted, *inter alia*, that the Complaints failed to state a claim upon which relief could be granted. After the actions of the two female students were consolidated in the trial court, the District Judge (Giles, J.) heard oral argument on September 18, 1990.

At the conclusion of the oral argument, Judge Giles directed that Plaintiffs, in essence, amend their Complaint so as to make their allegations of wrongdoing by both the School Defendants and the Perpetrator Defendants (the male students who had engaged in the offensive conduct complained of) more factually specific and particularized. On October 16, 1990, Plaintiffs filed their Amended Complaints based, in part, on the transcript of juvenile court proceedings wherein each of the individual Perpetrator Defendants had been adjudged a delinquent by the Court of Common Pleas of Bucks County, Pennsylvania (Garb, P.J.)

The School Defendants responded to the Amended Complaints by refiling motions to dismiss asserting the same arguments as had been asserted in the face of Plaintiffs' original Complaints.

On February 1, 1991, without further argument or proceedings, the trial court granted the motions of the School Defendants to dismiss the Federal Civil Rights claims (Counts I through IV, inclusive, of the Amended Complaints) and remanded Plaintiffs' pendent state claims for determination by the appropriate state court. Timely appeals were taken.

Following briefing and oral argument, the court below, in a 2-1 decision, on December 31, 1991, affirmed the judgment of the trial court on the proposition that, pursuant to this Court's decision in *DeShaney v. Winnebago County Dept. of*

Social Services, 489 U.S. 189 (1989), Petitioners here had failed to state a claim upon which relief might be granted.

A Petition for Rehearing En Banc was timely filed in the court below and was granted. Thereupon, following argument before the court *en banc*[7], a majority of the judges (six of the active Circuit Judges plus Senior Judge Seitz) reaffirmed the panel majority's conclusion that, pursuant to this Court's decision in *DeShaney*, Plaintiffs had failed to state a claim upon which relief might be granted and affirmed the dismissal.[8] Four of the active Circuit Court Judges, including Chief Judge Sloviter, dissented and Circuit Judge Becker dissented separately.

B. Statement of Relevant Facts

Given the fact that this Petition addresses a judgment that the pleading by Plaintiffs — Amended Complaints — is insufficient to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, exact quotation from the text of the pleading most aptly sets forth a concise statement of the facts.

> 21. At all times pertinent hereto, Plaintiff [L.H.] was a public school student at Defendant Middle Bucks Area Vocational Technical School subject to the compulsory attendance requirements of the laws of Pennsylvania including, but not limited to, 24 Pa. Cons. Stat. Ann. §§ 13-1326 through 13-1330, inclusive, and § 13-1333.
>
> 25. At all times pertinent hereto, minor Plaintiff D.R. was a public school student at Penn Ridge School District, at Defendant Bucks County Intermediate Unit

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7. All of the active judges of the Third Circuit sat for the *en banc* argument and were joined by Judge Seitz, a Senior Circuit Judge, who had been the author of the majority panel opinion.

8. The majority opinion in the *en banc* court, like the panel majority opinion, was written by Senior Circuit Judge Seitz.

No. 22 and at Defendant Middle Bucks Area Vocational Technical School subject to the compulsory attendance requirements of the laws of Pennsylvania including, but not limited to, 24 Pa. Cons. Stat. Ann §§ 13-1326 through 13-1330, inclusive, and § 13-1333.

24. At all times pertinent hereto, minor Plaintiff D.R. was an "exceptional child"[9] within the meaning of 24 Pa. Cons. Stat. Ann. § 13-1371 and § 13-1373.

13. At all times pertinent hereto, each of the foregoing School Defendants occupied a special fiduciary relationship with minor Plaintiff D.R. by virtue of her being an exceptional student under the supervision of the School Defendants and each of them, and their standing *in loco parentis* to her. Each of them also occupied a special fiduciary relationship with L.R. by virtue of their having assumed an *in loco parentis* standing as to D.R.

32. At all times pertinent hereto, minor Plaintiff D.R. was required to attend graphics occupations classes at Defendant Middle Bucks Area Vocational Technical School pursuant to arrangements made by Defendant Penn Ridge School District and Defendant Bucks County Intermediate Unit No. 22.

33. At all times pertinent hereto, while attending the graphics occupations classes mentioned in the preceding paragraphs of this Complaint, minor Plaintiff D.R. was subject to the immediate supervision of Defendant Peters who, as noted, was then and there acting as a part-time student teacher in charge of such class.

34. At all times pertinent hereto, while attending the graphics occupations classes as described in the preceding paragraphs of this Complaint, minor Plaintiff was subject to the immediate supervision of Defendants

9. D.R. is hearing impaired and, therefore, speech impaired from birth. Hence, she is an "exceptional child" as alleged in her Amended Complaint.

Goode, Bazzel, Richino and Tuttle acting in their respective capacities as school directors and administrators and/or school counselors.

35. At all times pertinent hereto, the Perpetrator Defendants were also duly enrolled in the graphics occupations classes of Defendant Middle Bucks Area Vocational Technical School, attended such classes with minor Plaintiff D.R., and were, at all times, subject to the control and supervision of the School Defendants, and each of them.

36. At all times pertinent hereto, Defendant Susan Peters, hired by Defendant Middle Bucks Area Vocational Technical School, lacked the qualifications, training and ability to teach and be in charge of the graphics arts class in that she did not possess a teaching certificate of any type and she did not have any experience in teaching or dealing with students with behavioral problems and other "exceptional" students.

37. At all times pertinent hereto, the School Defendants required that all students in the graphic arts class, both male and female, use one bathroom in the back of the classroom which was lockable from the inside, as well as a dark room which was lockable from the inside, with no supervision from any school authority.

38. Throughout the 1988-89 school year, from September 1988 through May 1989, the Perpetrator Defendants had behavioral problems, of which School Defendants had actual knowledge, but which problems Defendant Susan Peters and all other School Defendants did not control, to the injury and detriment of Plaintiffs. This knowledge and failure were evidenced, *inter alia*, by the following, which took place during this period of time and in the presence of Defendant Susan Peters and other School Defendants:

(a) The Perpetrator Defendants jumped around the classroom;

(b) The Perpetrator Defendants played "hacky-sack" in the graphic arts classroom;

(c) The Perpetrator Defendants wore their "walkmans" in the graphic arts classroom;

(d) The Perpetrator Defendants smoked cigarettes in the graphic arts classroom;

(e) The Perpetrator Defendants hid under their desks in the graphic arts classroom;

(f) The Perpetrator Defendants touched and grabbed various parts of the female students' bodies in the graphic arts classroom;

(g) The Perpetrator Defendants started a small fire in the graphic arts classroom;

(h) In February 1989, Defendant Brian Miller broke a window in the graphic arts classroom by pushing a metal pole through it;

(i) On various occasions in January and February, 1989, Defendant Brian Miller spit in a female student's hair and put wax in her hair in the graphic arts classroom;

(j) On various occasions, the Perpetrator Defendants made videotapes in the graphic arts classroom, including the following:

(1) In one such videotape, filmed in or about March 1989, the Perpetrator Defendants locked the door to the dark room and videotaped in the dark room and the bathroom for about thirty to forty-five minutes with at least one female student being pulled down, pinned down, and grabbed by them, and being asked questions regarding sex;

(2) The Perpetrator Defendants made at least one other videotape in the graphic arts classroom which filmed the Perpetrator Defendants touching and grabbing various parts of the female students' bodies, signs on which profanities were written, one of the Perpetrator Defendants "mooning" the camera (i.e., exposing his bared backside), and other chaotic activities in the graphic arts classroom;

(k) From December 1988 through May 4, 1989, Defendant Brian Miller uttered obscenities and profanities to female students, among others, in the graphic arts classroom, usually in the presence of Defendant Susan Peters;

(l) From January through May 4, 1989, Defendants Marc Ratcliffe, Charles Fambro, James Gallagher, Fred Freeman and Lester Sutphin uttered profanities and obscenities to female students, among others, in the graphic arts classroom, usually in the presence of Defendant Susan Peters;

(m) The Perpetrator Defendants did not do their work, were disruptive, threw materials around the graphic arts classroom, rough-housed, and repeatedly were allowed to watch and did watch a Jane Fonda exercise videotape (apparently for sexual gratification) in the graphic arts classroom in the presence of Defendant Susan Peters;

(n) On various occasions from October 1988 through May 1989, the Perpetrator Defendants bothered Plaintiff D.R., *e.g.*, teased her, knocked her sweater and purse on the floor and stepped on it, put their hands over her face or in front of the computer, asked her what the "dirty signs" are (i.e., the hand gestures used for signing by a hearing impaired person and intended to convey sexual meaning) or created their own "dirty signs", all in the presence of Defendant Susan Peters;

(o) On various occasions, Defendant Susan Peters found Plaintiff D.R., among others, with at least five to seven other students in the dark room in the graphic arts classroom when they did not belong there;

(p) On various occasions, Defendant Susan Peters saw that many students, both male and female, were in the graphic arts bathroom for long periods of time (ranging from fifteen to forty-five minutes) when they did not belong there;

(q) On various occasions, some of the Perpetrator Defendants physically struck female students, among others, in the graphic arts classroom;

(r) On various occasions, some of the Perpetrator Defendants picked up Defendant Susan Peters and locked her out of the classroom;

(s) Various forcible, offensive sexual contacts with Plaintiff D.R., among others, by the Defendant Perpetrators, which are more fully described in paragraphs 39 through 45, *infra;* and

(t) Various other acts, the full extent and nature of which will appear during the course of discovery in this action.

39. From January through the beginning of May 1989, the Perpetrator Defendants engaged in forcible offensive sexual contact with minor Plaintiff exceptional child D.R., some of which is more fully described below in paragraphs 40 through 45, *infra*, none of which offensive sexual contact was consented to and which included, but was not limited to:

(a) Touching by the Perpetrator Defendants, and each of them, of the genital parts of minor Plaintiff;

(b) Touching the breasts of minor Plaintiff;

(c) Forcing and causing minor Plaintiff to masturbate the Perpetrator Defendants, and each of them;

(d) Causing and forcing minor Plaintiff to commit fellatio on the Perpetrator Defendants, and each of them;

(e) The commission of acts of sodomy on minor Plaintiff;

(f) Causing and forcing minor Plaintiff to watch and observe the Perpetrator Defendants, and each of them, perform similar offensive sex acts on one or more other female students in the graphics occupations classes;

(g) Causing and forcing minor Plaintiff to watch and observe the Perpetrator Defendants have offensive physical contact—apparently non-sexual—with one or more of the school teachers including, but not limited to, Defendant Peters; and

(h) Various other acts, the full extent and nature of which will appear during the course of discovery in this action.

40. From January through April or the beginning of May 1989, during the graphic arts class, usually in the presence of, or with the help of, other Perpetrator Defendants, Defendant James Sperling grabbed Plaintiff D.R., pulled her or picked her up and carried her into the graphic arts bathroom or dark room, locked the door, turned off the lights, and forced her to masturbate him two or three times every week.

41. From January through April or the beginning of May 1989, during the graphic arts class, usually in the presence of, or with the help of, other Perpetrator Defendants, Defendant Marc Ratcliffe grabbed Plaintiff D.R., pulled her into the bathroom or dark room, locked the door, turned off the lights, and forced her to masturbate him or to perform oral sex on him two or three times every week.

42. From February through April 1989, during the graphic arts class, usually in the presence of, or with the help of, other Perpetrator Defendants, Defendant James Gallagher grabbed Plaintiff D.R., pulled her into the graphic arts bathroom or dark room, locked the door, turned off the lights, and forced her to masturbate him two to three times every week.

43. From January through April 1989, during the graphic arts class, usually in the presence of, or with the help of, other Perpetrator Defendants, Defendant Fred Freeman grabbed Plaintiff D.R., sometimes touched her breasts, pulled her into the graphic arts bathroom or dark room, locked the door, turned off the lights, and forced her to masturbate him three to four times every week.

44. In or about April 1989, during the graphic arts class, Defendant Brian Miller pulled or brought Plaintiff

D.R. into the bathroom and dark room and forced her to masturbate him, and pulled or brought her into the bathroom and forced her to perform oral sex on him.

45. From January through May 1989, during the graphic arts class, Defendant Lester Sutphin repeatedly requested Plaintiff D.R. to masturbate him.

46. During many of the incidents described in paragraphs 38 through 45 above, Plaintiff D.R. screamed or attempted to scream, and told the Perpetrator Defendants to stop what they were doing to her. When D.R. screamed, Defendant Susan Peters never listened to her and/or never took any action to stop the above-described incidents.

47. During each and every incident alleged in paragraphs 38 through 45, *supra*, Defendant Susan Peters was present, or should have been present, in the graphic arts classroom, heard or should have heard the obscenities and profanities uttered by the Perpetrator Defendants, saw or should have seen the Perpetrator Defendants grabbing, touching, and pulling Plaintiff D.R., and, as a consequence, knew or should have known of these offensive activities of the Perpetrator Defendants.

48. On the occasions when the forcible, offensive sexual contacts described in paragraphs 38 through 45, *supra*, were taking place, Defendant Susan Peters saw that many of the students in the graphic arts class were not in the theory room or in the work area, and knew or should have known that they, both males and females, were in the bathroom together.

49. Beginning in February 1989, on several occasions, Defendant Susan Peters asked various students about what was going on in the bathroom and asked where D.R. and male students were, and was told that D.R. and other students were in the bathroom together.

50. On one day in the middle of February 1989, Defendant Susan Peters banged on the bathroom door because so many people were in there and told the male and female students to come out of the bathroom, but Defendant Peters never put an end to these occurrences, and otherwise never fulfilled her duty to the female students in her class.

53. On various occasions when Plaintiff D.R. requested a hall pass in order to use another bathroom, Defendant Susan Peters did not give her one and/or walked away and/or did not listen to her, thereby creating an atmosphere which discouraged female students from using bathrooms other than the unisex bathroom located in the graphic arts classroom.

54. In or about January 1989, Plaintiff L.R. telephoned Defendant Susan Peters and expressed concern over the fact that she had heard that the graphic arts class was out of control, that there was no opportunity to learn in the graphic arts class, and that Plaintiff D.R. was being bothered by the male students in the class. In response, *Defendant Susan Peters told Plaintiff L.R. that she did not believe Plaintiff D.R.'s being bothered was a problem* [sic!] and *that she had requested help and support from various other School Defendants. The various School Defendants never provided the help or support requested* and needed *by Defendant Susan Peters in the graphic arts class.*

55. On the various occasions that the Perpetrator Defendants watched the Jane Fonda exercise videotape, as described in paragraph 38(m) above, Defendant Susan Peters knew that the Perpetrator Defendants were watching the videotape in that she was present in the classroom and *on one occasion in or about early April 1989, she [Peters] stated to Plaintiff L.R. that "the boys play it over and over again" and commented to Plaintiff L.R. about "those boys and their raging hormones".*

56. During most of the incidents described in paragraphs 39 through 44, Defendant Susan Peters was in the graphic arts classroom and knew what was happening, but would deliberately turn her head, keep busy, get on the telephone, go out into the hall, talk to another teacher, and/or otherwise fail to take any action to stop or report the activities.

57. On several occasions, including at least one occasion *in or about February 1989, Defendant Peters reported to the administration that the classroom was out of control, that the Perpetrator Defendants had bad manners and language, and that there was a problem with the students being in the bathroom; however, the School Defendants never took any action to put an end to these occurrences.*

58. On various occasions from January through May 1989, Defendant Christine Tuttle entered the graphic arts classroom, asked where Plaintiff D.R. was, and was told by the students that Plaintiff D.R. was in the bathroom, and rather than waiting or looking for Plaintiff D.R., Defendant Tuttle merely left the classroom.

59. *On various occasions from September 1988 through May 1989, Defendant Christine Tuttle saw the Perpetrator Defendants rough-housing and asked Plaintiff D.R. whether the Perpetrator Defendants were bothering her in the graphic arts classroom; when Plaintiff D.R. told Tuttle that they were and that she was upset, Defendant Christine Tuttle took no steps to stop or control the situation.*

60. On various occasions during the period from October 1988 through May 1989, *Defendant Christine Tuttle told Plaintiff L.R., among others, that Defendant Susan Peters could not control the Perpetrator Defendants in the graphic arts classroom.*

61. In or about the end of March or beginning of April 1989, during a conference with Ms. Bugaski (Plaintiff D.R.'s homeroom teacher at Penn Ridge High School), Ms. Mary Rogers (the coordinator for the Intermediate Unit students), Defendant Susan Peters, and Plaintiff L.R., Plaintiff L.R. informed them that *in or about mid-March 1989, a female student, Renee, had told Plaintiff L.R. that the boys in the graphic arts class were mean to Plaintiff D.R., teased her, and made up "dirty signs", and that "bad things" were happening in that classroom.* In response, *no action was taken* by the School Defendants to correct these matters.

62. *In December 1988, one female student reported to Defendant Bazzel that Defendant Brian Miller was trying to force her to masturbate him in the bathroom of the graphic arts classroom;* however, in response to this report, *Defendant Bazzel took no action* to correct this situation.

63. *During the 1988-89 school year, Gary Reising, a student in the graphic arts classroom, told the school administration that the class was disruptive due to various Perpetrator Defendants, and asked the school administrator to remove some of the students.* Gary Reising reported the misbehavior in the graphic arts class to Miss Brussell. In response, *the school administration* continued to send additional disruptive students into the graphic arts classroom and *took no steps to control the situation.*

64. *Dena Brosko, a student in the graphic arts classroom, reported to Mrs. Carson, her substitute teacher, that "things were going on in the bathroom" of the graphic arts classroom, but no action, inquiry, investigation, or other attempt to stop the Perpetrator Defendants' activities was made by the School Defendants.*

65. *Trina Ann Schleyer, a student in the graphic arts class, told her teacher, Mrs. Moyer, about what was*

going on in the bathroom of the graphic arts classroom, but no action, inquiry, investigation, or other attempt to stop the Perpetrator Defendants' activities was made by the School Defendants. (Emphasis supplied)

68. The fact of the occurrence of such foregoing offensive acts—sexual, physical and verbal acts—was, however, known at all times relevant hereto to the School Defendants, and each of them, as demonstrated by the allegations contained in paragraphs 38, 46-52, and 54-65.

69. Notwithstanding the knowledge described in the preceding paragraphs of this Complaint, and notwithstanding the fact that the School Defendants, and each of them, knew that such offensive acts were likely to occur in the future, the School Defendants, and each of them, took no steps to prevent the further occurrence of such acts or to report the occurrence of such acts either to Plaintiff L.R. or to other parents or to proper police authorities until May 4, 1989.

71. By the acts recited in the foregoing paragraphs of this Complaint, the School Defendants, and each of them, demonstrated a deliberate and reckless indifference to the rights of Plaintiffs and other similarly situated students and parents of students in the graphics occupations classes and other classes of the Middle Bucks Vocational Technical School.

73. The acts of the School Defendants, and each of them, as described in the foregoing paragraphs of this Complaint demonstrate, *inter alia*, a failure by those Defendants, and each of them, properly or adequately to train their classroom teachers (including, but not limited to, Defendant Peters) in the education of students, the protection of students' well being and classroom management.

74. The acts of the School Defendants, and each of them, as set forth in the preceding paragraphs as well as

in paragraph 84 of this Complaint, in setting up the graphic arts classroom, the dark room, and the unisex bathroom, demonstrate a custom, policy or practice of deliberate and reckless indifference to and the failure to protect the rights, including the constitutional right to personal bodily integrity, of its female students, and a failure to provide their students with a safe place to study and learn.

76. The acts of the School Defendants, and each of them, as set forth in the preceding paragraphs of this Complaint created a climate which facilitated sexual, physical and verbal abuse of students, especially of exceptional children. (Emphasis supplied)

ARGUMENT: REASONS FOR GRANTING THE WRIT

1. School Officials Do Occupy a DeShaney-Type Special Relationship With Their Students.[10]

The trial judge (James Giles, J., of the Eastern District of Pennsylvania) who granted the School Defendant's 12(b)(6) Motions on the basis of qualified immunity had no doubt that there is a Constitutional right to be free from unconsented-to physical or sexual assault by one's classmate. He said (A-10 to A-11):

> . . . it must be determined whether a special relationship existed between plaintiffs and the school defendants.
>
> Arguably, this case is analogous to involuntary custody cases where states have been found to have a duty to protect those in its custody. (cits. omitted) In *DeShaney*, the Supreme Court suggested that the state may be liable for failure to protect children in foster care homes, in line with cases holding that states have a duty to protect those held against their will, such as prisoners and the institutionalized mentally ill, from themselves and others. *DeShaney* 489 U.S. at __, 57 U.S.L.W. at 4221 n. 9.

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10. See Rule 10.1(c) of the Rules of this Court.

> *Plaintiffs argue that they were required by state law to attend school and, therefore, were subject to the custody of the institution during school hours. This court agrees.* Plaintiffs were required by state law to attend school, 24 Pa. Cons. Stat. Ann. §§ 13-1327, 13-1343 (Purdon 1982), and as public school students, were also required to attend the classes designated by the school district in which they resided. The control school defendants are legally required to assert over students in their custody suggests that they should have an affirmative duty of protection. 24 Pa. Cons. Stat. Ann. § 13-1317 (Purdon 1982).
>
> Section 13-1317 gives teachers and principals the same control over students' behavior, during school hours, that their parents would have. School officials' standing *in loco parentis* permit (sic) the exercise of such control reasonably necessary to prevent disciplinary infractions and interference with the educational process. Such discipline may include corporal punishment. *Glaser v. Marietta*, 351 F.Supp. 555 (D.D.C. 1972).
>
> *. . . school districts do have a duty to protect students from each other while on school property . . .*" (emphasis supplied)

In the court below, the Chief Judge (Dolores Sloviter), writing in dissent from the panel decision, neither doubted nor hesitated in finding such a duty. Chief Judge Sloviter wrote: (A-43 to -44, -45, -46, -48 to -49).

> Ever since the Supreme Court's opinion in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the inferior federal courts have struggled to draw the line that will distinguish between those state-citizen relationships where the state bears no responsibility for harm resulting from private conduct and those relationships where the state's actions and the private conduct are so intermingled that the state cannot disclaim its responsibility for the harm that results. The

case of children subjected to harm within the confines of a school that they are compelled to attend by state law offers perhaps the most acute of the scenarios raising this issue. . . .

* * *

. . . Under the allegations here, the state school significantly contributed to the harm by requiring these minor plaintiffs to remain in a chaotic classroom situation, constructing and maintaining a unisex lavatory where they could be assaulted without observation, assigning an apparently unqualified and ineffectual student teacher as the only supervisor in an out-of-control classroom, and adopting the position of the three monkeys who see, hear and speak no evil.

* * *

[The rationales of compulsory school attendance and in *loco parentis* standing] have been relied upon by the [Supreme] Court to recognize the special relationship between school officials and the students they supervise. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (recognizing 'the obvious concern on the part of . . . school authorities acting *in loco parentis*, to protect children . . . from exposure to sexually explicit, indecent, or lewd speech').

* * *

. . . In this case, the injury to D.R. did not come about through "other means," allowing the state to claim, as it did in *DeShaney*, that it did not play some role in creating the danger to the plaintiff or making her "more vulnerable." The most extreme sexual misconduct allegedly went on in a unisex lavatory, designated as such by school officials, with an inside lock. Appellants allege that the teacher of that classroom witnessed daily the chaotic behavior that took place in her classroom and was present when the male students grabbed at D.R., touched her breasts, pushed her down, and dragged her into the bathroom. App. at 222, 226-28. The teacher's general reaction was to ignore the behavior or walk away.

> App. at 229. The other school officials also knew and did not try to remedy the situation. App. at 230-232. On one occasion Peters even made the students open the bathroom door when she knew a number of boys and girls were in there. App. at 228. Apparently a videotape of the class was made by a male student which showed 'open lewdness' while the teacher was sitting at her desk watching. App. at 222-23, 739-41.
>
> I do not see how we can say that in this situation the harm to D.R. came about by means apart from the state and that the state had no role in creating the dangers to plaintiff. This is not 'private violence': some of it was carried out right in front of the teacher and the behavior in the lavatory, although outside of the teacher's immediate sight, was most likely well within her knowledge.

In the *en banc* decision below, the Chief Judge, writing for herself and three other members of that court, in dissent, still found no reason to doubt or hesitate in finding that freedom from unconsented-to physical or sexual assault by one's school mates is within the liberty interest of an individual. There, the dissenting judges said (A-85 to -86, -92, -102):

> . . . the state compulsion that students attend school, the status of most students as minors whose judgment is not fully mature, the discretion extended by the state to schools to control student behavior, and the pervasive control exercised by the schools over their students during the period of time they are in school, combine to create the type of special relationship which imposes a constitutional duty on the schools to protect the liberty interests of students while they are in the state's functional custody.
>
> * * *
>
> Unless custody is limited to incarceration and involuntary institutionalization (and the *DeShaney* language suggests otherwise), the duty of state entities to protect those already within their charge should be broad enough to extend at least to young children and those

> who, because of disability or other impairment, are not likely to seek assistance promptly. In fact, prisoners are probably much more articulate about their complaints about mistreatment than are school children, particularly when the treatment consists, as in this case, of sexual abuse.
>
> * * *
>
> . . . we owe immature school children attending public school who are seriously injured as a result of a policy of deliberate indifference to their danger no less a remedy than we are willing to provide to incarcerated criminals.

Likewise, Circuit Judge Edward Becker of the court below, writing in separate dissent, found (A-102 to -103):

> . . . the unique circumstances of this case imposed a constitutional duty on the school to protect the students' liberty interests for a combination of reasons: state law compelled the student to attend school; the student, by reason of her disability, lacked the capacity for mature judgment; and the school took affirmative steps to confine the student to situations where she was physically threatened. Although I do not believe that such a duty arises in every school situation, I have no difficulty deciding that it did arise here, where the school knowingly confined D.R. to a dangerous unisex bathroom and a chaotic classroom where she was repeatedly assaulted. . . .

Indeed, even the seven judges of the majority of the court below ruled that the right to such freedom does not exist within the §1983 context solely because of their reading of this Court's decision in *DeShaney*.[11] In other words, six of the

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11. They said (A-71):

> By requiring D.R. to attend assigned classes at Middle Bucks as part of her high school educational program, and authorizing officials to engage in disciplinary control over the students, the school defendants did not restrict D.R.'s freedom to the extent that she was prevented from meeting her basic needs. [cit. omitted] Thus, the school defendants' authority over D.R. during the school day cannot be said to create the type of physical custody necessary to bring it within the special relationship noted in *DeShaney*, particularly when their channels for outside communication were not totally closed.

judges in the courts below who have considered the facts of this case have concluded that the right to freedom from unconsented-to physical or sexual contact falls within the Due Process protected liberty interest; the other seven judges of the courts below who have considered the facts of this case have found that there is no such freedom interest in this case, but they do so only because of their reading of this Court's *DeShaney* ruling.

The importance of this Petitioner's request for a clarification of the *DeShaney* decision—that is, this Petitioner's request for a Writ of Certiorari—can be found simply (a) by looking at the frequency with which school room/schoolyard/schoolbus/physical/sexual abuse cases have arisen since *DeShaney*; (b) by noting the split amongst lower federal court judges as to (1) the reach of the *DeShaney* rule and (2) the appropriateness of such reach[12]; and (c) the volume of learned journal writing on the *DeShaney* rule and the near

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12. A table of federal judge views as to the reach of *DeShaney* in the school from context is as follows:

A special relationship *does* exist: *Maldonado v. Josey*, 1992 U.S. App. Lexis 21838 (10 Cir., 9/16/92) (concurring opinion); *Robt. G. v. Newburgh City School Dist.*, 1990 U.S. Dist. LEXIS 91 (S.D.N.Y.); *Doe A v. St. Louis Special School Dist.*, 637 F.Supp. 1138 (E.D. Mo., 1986); *Waechter v. School Dist.*, No. 14-030, 773 F.Supp. 1005 (W.D. Mich., 1991); *Whitt v. Deleu*, (W.D. Wisc., 87-C-324-C, July 19, 1989) (32 ATLA L.Rptr. 423 (1989)); *Pagano v. Massapequa Public Schools*, 714 F.Supp. 641 (E.D.N.Y. 1989); *Stauffer v. Orangeville School Dist.*, 1990 U.S. Dist. LEXIS 19133 and 19041 (N.D. Ill. 1990) (conditionally exists).

A special relationship *does not* exist: *Maldonado v. Josey*, 1992 U.S. App. Lexis 21838 (10 Cir.) (majority opinion); *J.O. v. Alton Community Unit School Dist. 11*, 909 F.2d 267 (7th Cir. 1990); *Dorothy J. v. Little Rock School District*, 794 F.Supp. 1405 (E.D. Ark. 1992); *Arroyo v. PLA*, 748 F.Supp. 56 (D.P.R. 1990); *Elliott v. New Miami Board of Education*, 1991 U.S. Dist. LEXIS 13985 (S.D. Ohio); *Doe v. Douglas County School Dist.*, 770 F.Supp. 591 (D. Colo. 1991); *Russell v. Fannin County School Dist.*, 784 F.Supp. 1576 (N.D. Ga. 1992); *Waechter v. School District*, 773 F.Supp. 1005 (W.D. Mich. 1991).

unanimity of scholarly disagreement with the rule, at least as applied in the school context.[13]

And, of course, it is important to school children themselves (and their parents) that this Court grant this Petition in order to make clear that *DeShaney* does not thwart school children from defending their liberty interest and their freedom from offensive sexual and physical contact. While Petitioner urges, like the four dissenting judges below, that there is a "special relationship" within the *DeShaney* meaning whereby school children such as this Petitioner are entitled to Constitutional protection of their liberty interest from physical and sexual abuse in the school context (a view with which at least thirteen lower court federal judges agree), Petitioner recognizes that a reasoned neutral principle of decision can be derived from the *DeShaney* opinion wherein a person such as herself is entitled to Constitutional protection of the liberty interest only in those circumstances where conduct of the school officials has increased the peril to which s/he is subject from her or his schoolmates. See, for example, dissenting Judge Becker in the court below and Judge Roszkowski in the Northern District of Illinois in *Stauffer v. Orangeville School District, et al.*, 1990 U.S. Dist. Lexis 19133 (May 17, 1990). Should this Court grant *certiorari* here, exploration of that alternative rule – which would, of course, entitle this Petitioner to relief – would be warranted.[14]

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13. More than thirty law review articles have been written on the *DeShaney* decision, most of them being critical of the decision. Inquiries of undersigned counsel for DR, coming from members of law journal student editorial boards, suggests that a flood of commentary on the DR decision below will shortly be forthcoming.

14. On the merits, Petitioners would contend that the *DeShaney* concept of "special relationship" serves the same function in constitutional tort jurisprudence (§ 1983 litigation) as *Palsgraf* serves for common law tort jurisprudence. That is, is the societal interest in protecting the individual Constitutional interest sufficiently great to justify vindication via compensatory damages liability? And, Petitioners contend, in turn, that the school context, and society's interest in freedom from student sexual abuse in that context, satisfy the *DeShaney* special relationship test.

The only reading of the *DeShaney* rule which Petitioner contends cannot survive analysis is the reading which concludes that under no circumstances do school authorities have the duty to protect and preserve the school children's liberty interest to be free from unconsented-to physical and sexual contact.[15]

Indeed, this Court has already articulated a guiding principle as to the role of schools in matters of "civilized social order":

> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of . . . conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct. . . .

Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986). For this reason alone, this Court should grant the instant Petition.

2. The Conflict Among The Circuits.[16]

The conflict among the Circuit Courts of Appeals on the meaning of the school's duties as to a "civilized social order"—as to the existence of a "special relationship *vel*

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15. The aridity of this application of the *DeShaney* principle can be gleaned from the crocodile tears and tongue-clucking which accompanies its application in lower court decisions. See, *e.g.*, the comments of Judge Seitz for the majority in the court below (A-55, -77):

> This appeal presents us with a classic case of constitutional line drawing in a most excruciating factual context.
>
> . . . we find this to be an extremely close case, and certainly a tragedy . . .

16. See, of course, Rule 10.1(a) of the Rules of this Court.

non – within the context of § 1983 protections of school children from unconsented-to sexual and physical touching is blatant. Compare the Third Circuit (as to which the instant Petition for a Writ of Certiorari is sought to be directed) and the Seventh[17] and Tenth[18] Circuits with the unanimous decision of the Fifth Circuit in *Doe v. Taylor Independent School District, et al.*, __ F.2d __ (No. 90-8431, 10/2/92, 1992 U.S. App. Lexis 24720).

The Third Circuit, as already described at length above, finds that the school setting creates no *DeShaney* "special relationship". In *J.O.*, 909 F.2D at 267, the Seventh Circuit ruled that sexual molestation of little children by a school teacher was not actionable under § 1983 since, under *DeShaney*,

> . . . the government, acting through local school administrations, has not rendered its schoolchildren so helpless that an affirmative constitutional duty to protect arises. Whatever duty of protection does arise is best left to laws outside the Constitution, as Illinois has done. . . .[19]

909 at 272.

Likewise, Circuit Judge Tacha, writing for himself and District Judge Benson, sitting by designation, ruled as follows for the Tenth Circuit in *Maldonado v. Josey, supra* (Slip op. at 10):

> . . . We hold that compulsory attendance laws in no way restrain a child's liberty so as to render the child and his

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17. *J.O. v. Alton Community Unit School District 11*, 909 F.2d 267 (7th Cir. 1990).

18. *Maldonado v. Josey*, __ F.2d __ (1992 U.S. App. Lexis 21838 No. 91-2176, 9/16/92).

19. This suggestion by Federal Judges – compare the "concerns about federalism" mentioned by the majority of the court below (A-84) – is a chimera. That is, under the applicable Pennsylvania law, for example (42 Pa. C.S.A. §8541, *et seq.*) there is immunity from liability on the part of school districts except in very narrowly limited exceptions, none of which exceptions seems to apply to the facts of these school child sexual abuse cases.

> parents unable to care for the child's basic needs. Thus, no affirmative duty arises merely on the basis of compulsory attendance laws.[20]

But, Circuit Judge Seymour, concurring, stated in *Maldonado* (*id.* at 20):

> . . . I believe the state owes a constitutional duty to provide for the reasonable safety of children required to attend school, . . .

and then concurred in the affirmance of the lower court saying (*id.* at 15):

> . . . Rather than conclude flatly that no affirmative duty exists in this situation, *I would* follow the analysis set out in *Yvonne L.*, 959 F.2d at 890-93, and *hold that a child legally required to attend school and thereby forced into the temporary day-time custody of the state's agents is constitutionally entitled to some level of protection from harm and care for basic safety*. I would nonetheless affirm summary judgment in defendant's favor because there is no evidence in the record that the teacher was deliberately indifferent to the danger that awaited Mark Maldonado, . . . (emphasis supplied)

And, in *Doe v. Taylor Independent School District, et al.*, __ F.2d __, 1992 U.S. Lexis 24720, a unanimous Fifth Circuit (Goldberg, Higgenbotham and Davis, Circuit Judges) stated the following (*id.* at 2, 5, 8, 10, 12):

> We hold that Jane Doe had a firmly established con-

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20. The result in *Maldonado* may be a perfect example of the rubric that "hard cases make bad law". That is, the factual predicate of the Constitutional claim in *Maldonado* was that an eleven year-old fifth grader, having been unsupervised in a cloak room adjacent to his classroom for approximately twenty minutes, "became caught on his bandana and died of strangulation". The facts of the incident are so sparse in the reported opinion (and in the record) to offer no clue as to why the child was in the cloak room, how he "became caught in his bandana", or whether this was a self-inflicted injury of which the school teacher and school authorities had no prior warning.

stitutional right under the due process and equal protection clauses of the Fourteenth Amendment to be free from sexual molestation by a state-employed schoolteacher, that the superintendent and principal had an affirmative, constitutionally-based duty to protect her from such an intrusion into her bodily integrity, and that a genuine dispute of material fact exists as to whether the superintendent and principal acted with deliberate indifference toward Jane Doe's firmly established constitutional rights. We therefore remand this case to the district court for trial.

* * *

A. Clearly Established Constitutional Right

The alleged constitutional violation in this case is the failure of Superintendent Caplinger and Principal Lankford to protect Jane Doe from the sexual molestation visited upon her by Coach Stroud, a subordinate of Caplinger and Lankford's. The inquiry can be divided into two discrete questions: first, whether sexual molestation of a schoolchild rises to the level of a constitutional deprivation, and second, whether top-level school officials owe the students entrusted to their care some affirmative duty of protection from such an assault on the students' constitutional rights.

* * *

2. School Officials' Duty of Care

Having concluded that Coach Stroud's sexual molestation of Jane Doe violated her firmly established constitutional right to substantive due process, we next consider whether Superintendent Caplinger and Principal Lankford violated Jane Doe's constitutional rights by failing to protect her from Coach Stroud's transgressions. In essence we ask whether school officials have some affirmative duty to protect schoolchildren from tortious conduct by others. This inquiry can be explored from two angles; either from the perspective that school officials are re-

sponsible for properly monitoring and disciplining subordinates (such as schoolteachers) over whom they exercise supervisory authority; or from the viewpoint that school officials have a constitutional duty to protect schoolchildren from known or reasonably foreseeable harms occurring during or in connection with school activities. n6 From either standpoint, we find such a duty.

n6 As we shall elaborate, infra, this duty arises by virtue of state law which compels public school attendance.

* * *

Alternatively, school officials can be held liable under § 1983 for the harms suffered by schoolchildren based on a breach of their duty to protect schoolchildren. Ten years ago, the Fifth Circuit . . . explained that a public school assumes a duty to protect [the schoolchildren] from dangers posed by anti-social activities—their own and those of other students—and to provide them with an environment in which education is possible.

* * *

This basis for liability, as this circuit has already intimated in Horton and Lopez, applies to public school officials because, by compelling a child to attend public school, the state cultivates a special relationship with that child and thus owes him an affirmative duty of protection. Although we too would not equate "a school yard to a prison," J.O. v. Alton Community Unit School Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990), we nevertheless find a schoolchild to be in the "functional custody" of school officials. (cits. omitted) Separated from his or her parents (guardians), the child's safety and well-being are entrusted to school officials. Contra (cits. omitted) Parents, guardians, and the children themselves have little choice but to rely on the school officials for some measure of protection and security while in school and can reasonably expect that the state will provide a safe school environment. To hold otherwise would call into question the constitutionality of compulsory attendance statutes,

> for we would be permitting a state to compel parents to surrender their offspring to the tender mercies of school officials without exacting some assurance from the state that school officials will undertake the role of guardian that parents might not otherwise relinquish, even temporarily.

* * *

Hence, as previously noted, the conflict amongst the Circuits as to the interpretation of § 1983 in the schoolchild context under the *DeShaney* rule is plain and requires resolution.[21]

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21. The table as to judges' views concerning §1983 – enforced protection of the liberty interests of school children from sexual and physical abuse further highlights, of course, the need for guidance from this Court. See fn. 12, *supra*. That is, there is not only a conflict amongst the Circuits; there is a widening conflict amongst all of the lower federal courts on this question. Indeed, compare the words of the Chief Justice in explaining the decision to grant *certiorari* in *DeShaney* itself (489 U.S. 189):

> Because of the inconsistent approaches taken by the lower courts in determining when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights, see *Archie v. City of Racine*, 847 F.2d 1211, 1220-1223, and n. 10 (CA7 1988) (en banc) (collecting cases), cert. pending, No. 88-576, and the importance of the issue to the administration of state and local governments, we granted certiorari.

CONCLUSION

In sum, for the reasons set forth in this Petition, particularly because of the conflict amongst the Circuits and because of the importance of the issue to the proper administration of the schools, as well as to the safety and bodily integrity of America's school children, this Court should grant a Writ of Certiorari directed to the United States Court of Appeals for the Third Circuit in order to bring this matter up for review.

Respectfully submitted,

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